

CLAUDIA B. BARBER,)	
)	
Plaintiff,)	Case No. C09-1033-RAJ-BAT
)	
v.)	REPORT AND
)	RECOMMENDATION
MICHAEL ASTRUE, Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	

Plaintiff Claudia B. Barber seeks review of the denial of her application for disability insurance benefits by the Commissioner of the Social Security Administration (“Commissioner”). The Commissioner concedes the case should be remanded. The only issue is whether the remand is for a determination of benefits, or for additional proceedings before the Administrative Law Judge (ALJ). For the following reasons, the Court recommends the Commissioner’s decision be **REVERSED** and **REMANDED** for further administrative proceedings.

Plaintiff is 59 years old, has a high school degree and has worked as a construction laborer and janitor. Tr. 49, 52, 79. On April 13, 2006, plaintiff protectively applied for disability benefits alleging disability beginning February 11, 2004. Tr. 108. The state agency found that plaintiff was disabled as of June 4, 2006, but determined that she was not disabled prior to that date. Plaintiff's request for reconsideration of the denial of her claim for the period before June 4, 2006

1 was denied. Tr. 11. On November 20, 2007, the ALJ conducted a hearing and issued a decision
2 on March 3, 2008 finding plaintiff not disabled for the time period between February 11, 2004 and
3 June 3, 2006. Tr. 21. The Appeals Council denied review of the decision, making it the
4 Commissioner's final decision under 42 U.S.C. § 405(g). Tr. 4.

5 **II. THE ALJ'S DECISION**

6 Applying the five-step sequential evaluation process¹ for determining whether a claimant is
7 disabled, the ALJ at step one found plaintiff has not engaged in substantial gainful activity since
8 her alleged disability onset date of February 11, 2004. Tr. 13.

9 At step two, the ALJ found plaintiff has the following severe impairments: history of radius
10 and ulna fractures, history of right rotator cuff tear and surgery, thoracic spine degenerative disc
11 disease, and borderline intellectual functioning. Tr. 14.

12 At step three, the ALJ found plaintiff does not have an impairment or combination of
13 impairments that meets or medically equals one of the listed impairments.² Tr. 15.

14 Before proceeding to step four, the ALJ found plaintiff had the residual functional capacity
15 (RFC) to perform light work which is simple and repetitive in nature and does not involve working
16 overhead with her right dominant hand. Tr. 16.

17 At step four, the ALJ found plaintiff could not perform her past relevant work as a
18 construction laborer, janitor, or janitorial supervisor. Accordingly, the ALJ found that plaintiff
19 was unable to perform her past relevant work. Tr. 20.

20 And at step five, the ALJ found plaintiff could work as a "night cleaner," "assembler,"
21 "courier," and "photo copy machine operator," and that plaintiff is therefore not disabled. Tr. 20-
22 21.

23 ¹ See 20 C.F.R. §§ 404.1520, 416.920.

² See 20 C.F.R. Part 404, Subpart P, Appendix 1.

III. STANDARD OF REVIEW

This Court may set aside the Commissioner's denial of disability benefits when the ALJ's findings are legally erroneous or not supported by substantial evidence. 42 U.S.C. § 405(g); *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that the Court must uphold. *Id.*

IV. DISCUSSION

Plaintiff contends the ALJ erred by (1) failing to include in the record the independent medical examination (IME) of Dr. J. Green, M.D., and the physical capacity report of Dr. Thomas Castle, Jr. M.D.; (2) crediting the opinion of Dr. Castle over the opinion of Dr. Dan Welch; (3) finding plaintiff's testimony not credible; and (4) failing to include all of plaintiff's restrictions in her residual functional capacity. Dkt. 9 at 6. Plaintiff argues the Court should remand the case for an award of benefits because the ALJ failed to give sufficient reasons to reject Dr. Welch's opinion and plaintiff's "pain testimony." *Id.* at 15.

The Commissioner concedes "the ALJ erred in his evaluation of the record" and that the ALJ's errors compel reversal and remand. Dkt. 13 at 5. Specifically, the Commissioner concedes

1 the ALJ failed to include in the record Dr. Green's IME and Dr. Castle's physical capacity report,
2 and failed to mention or include in his RFC determination Dr. Theodore J. Becker's February 2005
3 opinion that plaintiff had limited grasping and lifting abilities. *Id.* at 7.

4 The Commissioner contends the Court should remand the case for further proceedings
5 because "there are unresolved issues, and the record does not require a finding of disability." *Id.* at
6 6. The Commissioner requests the Court order a new hearing and to instruct the ALJ to "(1)
7 update the record by obtaining the April 3, 2006, independent medical examination (IME) report
8 from Dr. Green and the physical capacity evaluation prepared by Dr. Castle on December 7, 2004;
9 (2) reevaluate and further develop the medical evidence in the record; (3) reevaluate steps two and
10 three of the sequential evaluation process; (4) reevaluate Plaintiff's credibility; (5) reevaluate
11 Plaintiff's RFC; and (6) reevaluate steps four and five of the sequential evaluation process with the
12 assistance of a vocational expert as necessary." *Id.* at 5.

13 The appropriate judicial response in a case where the ALJ improperly rejects evidence was
14 first discussed in *Varney v. Secretary of Health and Human Services*, 859 F.2d 1396, 1398-99 (9th
15 Cir. 1988). In *Varney*, the Court adopted a "credit-as-true" rule holding the Commissioner must
16 accept, as a matter of law, a claimant's subjective pain testimony if the ALJ fails to articulate
17 sufficient reasons for refusing to credit it. *Id.* However, the holding in *Varney* is limited to cases
18 "where there are no outstanding issues to resolve before a proper disability determination can be
19 made, and where it is clear from the administrative record, that the ALJ would be required to
20 award benefits if the claimant's excess pain testimony were credited." *Id.* at 1401.

21 As the parties point out, it unclear whether the *Varney* rule is mandatory or discretionary.
22 Compare *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995) (holding improper rejection of
23 claimant's testimony that he is disabled must be credited as a matter of law) with *Connett v.*

1 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (Court has “some flexibility in applying the crediting
2 as true theory.”).

3 Here, the Court concludes the appropriate judicial response is to remand the case for further
4 administrative proceedings. First, the errors to which the Commissioner admits – the ALJ’s failure
5 to include Dr. Green’s IME and Dr. Castle’s report and include in his RFC determination Dr.
6 Becker’s opinion that plaintiff had limited grasping and lifting ability – do not compel a finding of
7 disability. At this point, it not known what opinions are contained in the missing reports or what
8 impact Dr. Becker’s opinions would have on plaintiff’s RFC.

9 Second, even if the Court accepts plaintiff’s contention that the ALJ erred in discounting
10 her credibility, and credited plaintiff’s “pain testimony” (Dkt. 9 at 11) as true, the Court cannot say
11 the ALJ would be required to find her disabled. This is because it is unclear whether plaintiff’s
12 “pain” itself or in combination with other conditions renders plaintiff disabled. Dr. Welch,
13 plaintiff’s treating doctor, opined “[b]ut for the effects of the pre-existing cognitive condition, the
14 claim related condition is not sufficient to permanently totally disable the worker from full time
15 gainful employment . . . However, when the claim related condition is combined with the pre-
16 existing condition, the worker is rendered totally disabled.” Tr. 225. The Court will not jump to
17 any conclusions about whether plaintiff’s “pain” is part of her cognitive condition or what role
18 “pain” plays in Dr. Welch’s opinion where the doctor did not make that clear. Accordingly, the
19 Court views this as an unresolved, or at least unclear, issue that should be resolved before a
20 determination of disability can be made.

21 Third, plaintiff argues the ALJ erred in rejecting Dr. Welch’s opinion that she is disabled.
22 However, the ALJ’s evaluation of Dr. Welch is not as open and shut as plaintiff claims. A treating
23 physician’s opinion is entitled to special weight. *Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir.

1 1981). But, a treating physician’s opinion is not necessarily “conclusive as to either a physical
2 condition or the ultimate issue of disability,” *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
3 Cir.1989), and may be rejected if contradicted by another doctor's opinion and the ALJ gives
4 “specific and legitimate reasons” for doing so that “are supported by substantial evidence” in the
5 record. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

6 Here, Dr. Welch found plaintiff had physical limitations to her shoulder, right extremity
7 and problems with her back and ankle. The ALJ’s determination that these findings are not
8 supported by objective findings is at odds with the undisputed fact that plaintiff fell 20 feet,
9 shattered her right forearm and shoulder, required surgical repair (Tr. 14) and has significant disc
10 herniation at T10-11 as shown through an MRI. Tr. 252. It is also contrary to the other medical
11 evidence in the record which indicate that plaintiff’s upper extremity conditions prevent her from
12 performing any past relevant work and limit her RFC. This error, however, does not mandate an
13 award of benefits because Dr. Welch opined that these conditions alone – the “claim related
14 conditions” – do not render plaintiff totally disabled. Tr. 225.

15 Rather, Dr. Welch opined plaintiff’s “cognitive condition” combined with her other
16 conditions rendered her disabled. He did not, however, explain what these cognitive conditions
17 were and why he thought they disabled plaintiff. An ALJ need not accept the opinion of a doctor
18 if that opinion is brief, conclusory and inadequately supported by clinical findings. *Tonapetyan v.*
19 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). Here the ALJ acknowledged plaintiff had cognitive
20 limitations, including borderline intelligence, concentration problems and pain (Tr. 19), but
21 concluded that she still had the capacity to perform simple, repetitive tasks. This conclusion may
22 change, of course, after the ALJ, on remand, reevaluates steps two through five, considers
23 additional evidence and reevaluates the medical sources, plaintiff’s RFC and plaintiff’s credibility.

1 Accordingly, the Court finds there are still outstanding issues as to Dr. Welch's opinion that must
2 be resolved before a determination of disability can be made.³

3 In sum, the case should be remanded for further administrative proceedings. The Court
4 recommends the ALJ be directed to reevaluate all of the medical evidence and plaintiff's
5 credibility. The ALJ should (1) update the record by obtaining the April 3, 2006, independent
6 medical examination (IME) report from Dr. Green and the physical capacity evaluation prepared
7 by Dr. Castle on December 7, 2004; (2) reevaluate and further develop the medical evidence in the
8 record; (3) reevaluate Dr. Welch's opinion; (4) reevaluate steps two and three of the sequential
9 evaluation process; (5) reevaluate plaintiff's credibility; (5) reevaluate plaintiff's RFC; and (6)
10 reevaluate steps four and five of the sequential evaluation process with the assistance of a
11 vocational expert.

12 V. CONCLUSION

13 For the foregoing reasons, the Court recommends the case be **REVERSED** and
14 **REMANDED** for further administrative proceedings consistent with this report and
15 recommendation. A proposed order accompanies this Report and Recommendation.

16 DATED this 22nd day of February, 2010.

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18 

19 BRIAN A. TSUCHIDA
20 United States Magistrate Judge

21 _____
22 ³ Because there are outstanding issues to resolve, and the case is being remanded for reevaluation
23 of steps two through five, the Court declines to find, as the Commissioner urges, that the ALJ
properly found plaintiff not credible and properly rejected Dr. Welch's opinion that plaintiff is
disabled. *Id.* at 8, 12.